

Pritish Kumar Mitra Vs. Prosanto Kumar Mitra and anr.

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Court : Kolkata

Decided On : Sep-16-1969

Reported in : AIR1970Cal236,74CWN272

Judge : Amaresh Roy and ;S.N. Bagchi, JJ.

Acts : Court-fees Act, 1870 - Section 19I and 19H

Appeal No. : Civil Rule No. 2964 of 1969

Appellant : Pritish Kumar Mitra

Respondent : Prosanto Kumar Mitra and anr.

Advocate for Def. : Lala Hemanta Kumar, ;Rabindra Nath Mitra and ;Ranen Mitra, Advs. for Opp. Party No. 1, ;Sushil Chandra Dutta and ;A.K. Matilal, Advs. for Opp. Party No. 2

Advocate for Pet/Ap. : Bijan Behari Das Gupta and ;Sibdas Ghosal, Advs.

Judgement :

Amaresh Roy, J.

1. This Rule issued upon an application under Section 115 of the Code of Civil Procedure against an order passed by the learned Additional District Judge of Alipore in a pending probate proceeding numbered as Other Suit No. 6 of 1969. In

that proceeding Prithish Kumar Mitra has applied for grant of Letters of Administration with a copy of the Will annexed propounding therein a Will which he alleges is the last testament of his uncle Probodh Kumar Mitra. When that proceeding was pending, the propounder Prithish Kumar Mitra made an application to Court stating that the requisite Court-fees have already been paid in a proceeding No. 131 of 1949 under Act XXXIX of 1925, and that he would deposit the ad valorem Court-fees on the Affidavit of Assets in the present proceeding at the appropriate stage. That matter was heard by the learned Additional District Judge on 14th of August, 1969.

2. The background of that petition made by Prithish Kumar Mitra was that in the previous proceeding No. 131 of 1949 the same Will of Probodh was propounded by Prithish's eldest brother Prafulla Kumar Mitra who was named as an Executor in the Will. There was no contest raised in that proceeding and the District Delegate made a grant of Probate upon a stamp duty of Rs. 5460/- being paid in that proceeding. Thereafter there was an application for revocation of the grant by a person who was a brother of the testator Probodh and the grant was revoked. The Probate proceeding was at that stage contentious and was therefore being dealt with in the Court of the District Judge or a specially authorised Subordinate Judge. During the pendency of that contentious Probate proceeding which started upon the application by Prafulla, Prafulla died. Thereupon Prithish Kumar Mitra made a fresh application praying for Letters of Administration with a copy of the Will annexed and the present proceeding has commenced upon that application.

3. The learned Additional District Judge in his Order No. 144 dated 14th of August, 1969 held that a stamp duty of Rs. 5460/- was deposited in the case No. 131 of 1949 in December, 1949 upon a valuation of Assets at Rs. 1,42,000/- in the Affidavit of Assets, while the Collector after enquiry assessed that valuation at Rs. 4,47,200/-. Consequently the Executor Prafulla in that proceeding was directed to pay the additional stamp duty of Rs. 17,258/-. That stamp duty, it appears, has not been paid.

4. In the present proceeding the pro-pounder Prithish Kumar Mitra has estimated the value of the estate of the deceased at Rs. 3,64,500/- in his Affidavit of Assets.

The learned Additional District Judge has noted in that order that a copy of the application for Letters of Administration or Affidavit of Assets have not been forwarded to the Collector under the provisions of Section 19-H of the Court-fees Act. He, therefore, directed that the said copies should be forthwith forwarded to the Collector for necessary action under Sub-section (3) of Section 19-H of that Act.

5. When the learned Additional District Judge has by that Order No. 144 held that the plaintiff may be directed at this stage to pay the deficit Court-fee being the difference between the Court-fee payable on the valuation made in the Affidavit of Assets filed in the previous case No. 131 of 1949 and the valuation made in the Affidavit of Assets filed in the present proceeding. The propounder Prithish Kumar Mitra was directed to pay the difference of Court-fees on the valuation between Rs. 1,42,000 and Rs. 3,64,500 by 18th of August, 1969. In the same order the learned Additional District Judge has directed that the copy of the application for Letters of Administration and Affidavit of Assets together with the Order No. 144 be forwarded to the Collector, 24-Parganas for enquiry and necessary action under Section 19-H(3) of the Court-fees Act.

6. After that Order No. 144 was made Prithish Kumar Mitra filed an application under Section 151 of the Code of Civil Procedure before the learned Additional District Judge praying for modification of the Order No. 144 dated 14th of August, 1969. It was contended on behalf of the petitioner that only after the Will has been proved and the decision has been arrived at by the Court that the propounder is entitled to the grant, be it Probate or be it Letters of Administration with a copy of the Will annexed, then only before an order entitling the petitioner to grant a Probate or Letters of Administration is made that the Court-fees according to Article 11 of the first Schedule of the Court-fees Act upon the valuation of property in the estate need be paid under Section 19-I of the Court-fees Act. The learned Additional District Judge has, however, taken a view that he would not proceed to hear the Probate proceeding by taking evidence until the Court-fees according to the value of the estate in the Affidavit of Assets have been paid and has rejected the application under Section 151 of the Code of Civil Procedure by his Order No. 146 dated 18th of August, 1969. Against that order Prithish Kumar Mitra moved this

Court and the present Rule issued.

7. At this hearing the learned Advocate for the petitioner Mr. Bijan Benari Das Gupta has drawn our attention to the impugned order. It appears that in support of the proposition that in a Probate proceeding application for Probate or for the matter of that, application for Letters of Administration with a copy of the Will annexed, need not bear on it ad valorem Court-fees according to the valuation of the estate of the Testator at a stage when such application is presented to Court a decision of this Court in the Goods of Mrs. Lilian Singh (otherwise known as Mrs. Lila Singh), AIR 1943 Cal19 was cited before the learned Additional District Judge. The learned Additional District Judge has noticed the passage in, that judgment delivered by Sen, J. to which it was observed:

'In my opinion the provisions of Section 19-I, Court-fees Act, instead of supporting Mr. Banerjee's contention destroys it. The section says that the Court shall not grant Probate until the fees are paid. It does not say that the Court shall not try an application for Probate or Letters of Administration until the fees are paid or that the payment of the fees is a condition precedent to the making of the application.'

But the learned Additional District Judge was of the view that those observations were in the nature of 'obiter dicta' and also that the observations cannot be regarded as ratio decidendi and those observations cannot be considered to be an authority for the, proposition sought to be made out by the plaintiff. In this view the learned Additional District Judge is astonishingly in error. The passage to which he has made reference was dealing with an argument raised before the learned Judge Sen, J, that the Court-fee has not been paid and therefore there was no competent application before the Court. That contention needed to be dealt with for the decision of the case and was dealt with by the learned Judge by holding that even though at that stage ad valorem Court-fees on the value of the Assets of the testator had not been paid, there is a properly constituted application for Letters of Administration before the Court. What astonishes us is that such a decision of this Court could be thought by the Additional District Judge to be only an 'obiter dicta'.

8. The learned Additional District Judge has also been in error in understanding the plain meaning of Section 19-I which has been quoted by him, and also the clear and unambiguous decision of this Court upon that language of the section. The reason for the error apparently is that the learned Additional District Judge has confused between the right to prove a Will to be entitled to a decision that a grant should be made and order entitling the petitioner to the grant of Probate or Letters of Administration occurring in Section 19-I of the Court-fees Act. That distinction has been recognised and emphasised by the Legislature also as would have appeared clearly to the learned Additional District Judge if he had taken care to examine other relevant sections in the Court-fees Act itself and had noticed that in Section 19-C the language employed is 'whenever a grant of Probate or Letters of Administration has been or is made' whereas in Section 19-I the words are 'No order entitling, the petitioner to the grant of Probate or Letters of Administration'. Not only so. if the learned Additional District Judge's attention had been drawn to Section 19-H, it should have been clear to him that the succession of steps and events in a Probate proceeding are:--

- (1) An application for Probate or Letters of Administration is made to Court;
- (2) The Court shall cause notice of the application to be given to the Collector;
- (3) The Collector shall hold an enquiry into the matter and if he is of opinion that the value of the property has been under estimated may require the petitioner to amend the valuation;
- (4) If the petitioner does not amend the valuation to the satisfaction of the Collector, the Collector may move the Court;
- (5) The Court when so moved shall hold or cause to be held an enquiry and record a finding as to the true value.

That finding of the Court shall be final. All these are clearly appearing in the several sub-sections of Section 19-H. Then the next Section 19-I says: 'No order entitling the petitioner to the grant of Probate or Letters of Administration shall be made upon an application for such grant until the petitioner has filed in the Court a

valuation of the property in the form set forth in the third schedule, and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation.'

That Section does not prevent the Court from hearing the application for Probate but only prevents it from making an order granting Probate until Court-fees have been paid, that is what has been clearly pointed out by Sen. J. In the judgment reported in AIR 1943 Cal 19 at p. 21 by observing

'The section says that the Court shall not grant Probate until the fees are paid. It does not say that the Court shall not try an application for Probate or Letters of Administration until the fees are paid or that the payment of the fees is a condition precedent to the making of the application.'

In fairness to the learned Additional District Judge we also notice that he was swayed by the decision of the Patna High Court reported in : AIR1955 Pat362 , Mundrika Prasad Singh v. Mst. Kachnar Kuer.

9. We have examined that decision of the Patna High Court but we cannot agree with the view that has prevailed there but we hold that the view of law taken by Sen. J. In the decision : AIR1943 Cal19 is the correct view. Without entering into a detailed discussion of the reasons mentioned in the judgment of the Patna High Court : AIR1955 Pat362 , we, need only say that though hearing culminates in the order made upon such hearing, the order may not only be an order entitling the petitioner to the grant of Probate, but also an order rejecting his application for Probate. If latter is the result obtained in the Probate proceeding then Section 19-I is not attracted- Their Lordships of the Patna High Court do not appear to have considered that aspect. The view that has been consistently held in our High Court and which we are following is also the view that prevailed in Punjab High Court as it appears in the case of Sushela Dantyagi v. State, ILR (1956) Punj 1356.

10. We need also to point out that the Court-fees Act is a piece of legislation where the State Legislatures in the different States of India have been given power to carry out their own amendments and there have been such amendments galore in the various provisions of the Court-fees Act. So on questions arising out of

Court-fees Act, for relying on decisions of other High Courts in the other States it is necessary to take care to compare the particular sections as they prevail in that particular State. The learned Additional District Judge has not done so. That however need not detain us, because though the language of the section prevailing in the State of Bihar is the same as the language in the Court-fees Act in the relevant sections prevailing in the State of West Bengal, even then when there is a clear and unambiguous authority of the High Court to which the learned Additional District Judge is subordinate, it is his bounden duty to follow that decision and he cannot proceed to express contrary views or decide cases according to such contrary view by relying on decisions of other High Courts. To that extent the learned Additional District Judge has revealed impropriety.

11. We may mention here that at the hearing before us all the parties have appeared. On behalf of the propounder Pritish Kumar Mitra, the learned Advocate Mr. Bijan Behari Das Gupta has assailed both the orders i.e., order No. 144 and order No. 146 passed by the learned Additional District Judge. Opposite Party No. 1 Prosanta Kumar Mitra is represented before us by the learned Advocate Mr. Lala Hemanta Kumar. At the outset Mr. Lala has made his position clear that he will not make any endeavour to support the view of the learned Additional District Judge and that his position is neutral. While saying so Mr. Lala also pointed out that the view that has prevailed with the learned Additional District Judge was not a contention raised by his client before that Court. Opposite Party No. 2 Mrs. Dorothea Mitra is represented by the learned Advocate Mr. Sushil Chandra Dutta. He also has been in the same position as Mr. Lala before us by pointing out that his client Mrs. Dorothea Mitra did not even participate in the hearing in which the Order No. 144 and Order No. 146 were passed by the learned Additional District Judge.

12. We will also point out here that by the reason of procedure clearly laid down by the sections of the Court-fees Act to which we have made reference invariable practice in the Courts subordinate to this High Court has been that when an application for Probate or Letters of Administration is made to any Court, ad valorem Court-fees on the value of the assets of the estate of the testator, be it according to the valuation put in the Affidavit of Assets or be it the valuation fixed

by the Collector or finally decided by the Court under Section 19-H, is not payable until the Court has proceeded with the hearing of the application by taking evidence affording opportunity to the propounder to prove the Will and also his right to' an order entitling him to the grant of Probate or Letters of Administration. Only when the Court has arrived at the decision that the propounder is entitled to the grant of Probate or Letters of Administration, then only, but before the order entitling the petitioner to the grant of Probate or Letters of Administration is made the Court-fees mentioned in Article 11 of the First Schedule of the Court-fees Act need be paid upon the valuation found by the Court under Section 19-H. That practice has very weighty reasons behind it both in the provisions of law, as also in the principles that apply to Probate proceedings. An application for Probate or Letters of Administration with a copy of the Will annexed cannot be equated to a Plaint or for the matter of that a Memorandum of Appeal. In Section 8 of Court-fees Act the Legislature has employed the language 'amount of fee payable under this Act on Memorandum of Appeal' in Section 8-A the language employed by the Legislature is 'in every suit in which ad valorem Court-fee is payable under this Act on the Plaint'. In Section 19 which makes exemptions of certain documents, in Clause (viii). That exemption is not an application for Probate or for Letters of Administration, but exemption is in the language 'Probate of a Will', Letters of Administration. Then in Section 19-C of the Court-fees Act which gives relief in case of several grants the language occurs 'whenever a grant of Probate or Letters of Administration has been or is made in respect of whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon.' That language clearly shows that in a Probate proceeding Court-fees are paid on the grant but not on the application. An unsuccessful propounder of a Will is not liable to pay Court-fees mentioned in Section 19-I of Court-fees Act.

13. We, therefore, hold that the order moved against i.e., Order No. 146 dated 18th of August, 1969 is an erroneous order. The source of the error is in order No. 144 which was passed by the learned Additional District Judge on 14th of August, 1969. When that error was brought to the notice of the learned Additional District Judge by the application under Section 151 of the Code of Civil Procedure praying for modification of that previous order No. 144, the only correct and proper order that should have been made by the learned Additional District Judge is that the

application under Section 151 of the Code of Civil Procedure should have been allowed and the Order No. 144 should have been modified by accepting the contention of the petitioner Pritish Kumar Mitra that the Court-fees according to the valuation fixed under Section 19-H of the Court-fees Act will be payable at a stage if and when an order entitling the grant of Probate or Letters of Administration would be made and not at any previous stage. Hearing of the proceeding should continue till that stage is reached.

14. We, therefore, direct that order No. 146 passed by the learned Additional District judge be set aside and the order No. 144 dated 14th of August, 1969 stands modified as indicated above. The proceedings for hearing and disposal of the application for Letters of Administration with a copy of the Will annexed should go on in accordance with the law and at the proper stage the provisions of Sections 19-H and 19-I of the Court-fees Act should be complied with.

15. The Rule is accordingly made absolute.

16. There will be no order as to costs in this Rule.

17. Let this order be sent down without delay.

Bagchi, J.

18. I agree.